REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21972/2015

Before the Hon. Mr Justice Bozalek
Hearing: 10 and 14 November 2016
Judgment Delivered: 10 August 2017

In the matter between:

JAMES KING N.O	***1st Applicant***
TRUDENE FORWORD N.O.	***2nd Applicant***
ANNELIE JORDAAN N.O.	***3rd Applicant***
ELNA SLABBER N.O.	***4th Applicant***
KALENE LE ROUX N.O.	***5th Applicant***
SURINA SERFONTEIN N.O.	***6th Applicant***

and

CORNELIUS ALBERTUS DE JAGER	***1st Respondent***
JOHANNES FREDERICK DE JAGER	***2nd Respondent***
ARNOLDUS JOHANNES DE JAGER	***3rd Respondent***
HENDRICK CHRISTIAAN SLABBER	***4th Respondent***
JACOBUS HENDRIK SERFONTEIN	***5th Respondent***
DAVID-JOHN FORWORD	***6th Respondent***
CHARL WYNAND ROUX	***7th Respondent***
KALVYN ROUX	***8th Respondent***
THE MASTER OF THE HIGH COURT, CAPE TOWN	***9th Respondent***

JUDGMENT

BOZALEK J

[1] This application raises as a primary issue whether a Court can amend the wording of a will which established a *fideicommissum* containing a condition discriminating against female descendants. The issue brings to the fore two potentially competing rights, the right to freedom of testation on the one hand and the right to equality (more specifically the right not to be unfairly discriminated against) on the other.

THE PARTIES

[2] The first applicant is an attorney and one of the six co-executors in the deceased estate of the late Kalvyn de Jager who died on 5 May 2015 ('the deceased'). The deceased, who died testate, had no sons but left five daughters who are the second to sixth applicants and are co-executors with the first applicant in the deceased's estate.

[3] The first to third respondents are the sons of the deceased's late brother, John de Jager, who died on 6 October 2005.

[4] The fourth to eighth respondents are the sons of the second to sixth applicants i.e. the deceased's grandsons.

[5] The Master of the High Court is the ninth respondent.

[6] Only the first to third respondents oppose the application.

THE FACTUAL BACKGROUND

[7] The dispute arises out of a joint will ('the will') executed on 28 November 1902 in Oudtshoorn by the deceased's grandparents, Carel de Jager and Catherina de Jager ('the testators') who were married in community of property. The testators had six children comprising four sons and two daughters. In the will they bequeathed various fixed

properties, including many farming properties, to their four sons and two daughters subject, however, to *fideicommissa* governed by clause 7 thereof. According to its provisions all of the fixed properties, both those specifically named as well as unnamed properties (save for a certain piece of property bequeathed to one daughter under clause 5) were made subject to the *fideicommissa*. Until the deceased's death the terms of the *fideicommissa* were interpreted and applied as appointing only the sons of the testators' children, and thereafter their sons, as *fideicommissary* beneficiaries. In other words both the first and the second substitutions limited the *fideicommissary* beneficiaries to descendants of the male gender.

[8] The present application is said by the applicants to concern only certain farming properties which were initially bequeathed to the deceased's father, Cornelius de Jager, one of the testators' four sons.

[9] It is not known when the co-testatrix died but according to an abridged family tree, the co-testator died in 1904 and presumably some time thereafter the farms which were bequeathed to Cornelius de Jager were inherited by him as fiduciary heir. According to the family tree, Cornelius de Jager died in 1957. He had three sons, Corrie de Jager (who died on 19 March 1984 or 1998 - the papers are contradictory), John de Jager (who died on 6 October 2005) and the deceased, Kalvyn de Jager (who died on 5 May 2015). Cornelius de Jager also had six daughters but details of when they died and what progeny, if any, they had are not given in the papers nor reflected in the family tree. This is presumably so because on the long accepted interpretation of clause 7 of the will, they never became *fideicommissary* beneficiaries to any property. As a result Cornelius de Jager's abovementioned three sons each became fiduciary heirs to a one third share in the farms, subject to the *fideicommissum* in clause 7 of the will. Put differently, the first

substitution of fiduciaries in respect of those properties i.e. to the testators' grandsons, occurred after Cornelius' death in 1957.

[10] Of those three grandsons, Corrie de Jager left no children upon his death and his one third share in the properties devolved, in terms of clause 7 of the will, in equal parts upon his two surviving brothers, namely John de Jager and the deceased. Upon the death of John de Jager in 2005 his half share of the properties in question (i.e. his original one third share plus his one sixth share which he inherited from his brother, Corrie) devolved upon his three sons, the first to third respondents, but now free of any *fideicommissum*. This was the second in the series of substitutions of fiduciaries, namely, to the testators' great grandchildren in their capacity as *fideicommissaries*.

[11] After the first to third respondents received their inheritance they, and one of their trusts, concluded an agreement with the deceased dividing up their respective interests in the *fideicommisary* property. According to the first applicant's founding affidavit the result is that in terms of certain title deeds the deceased became the co-owner in undivided shares of three specific properties, namely, the farms Nieuwdrift Nr 88, Doornkuil and Buffelsdrift Nr 260, all in the district of Oudtshoorn. The title deeds in terms of which the deceased held his respective half shares in each of the three properties stipulate that his title in each case was subject to clause 7 of the will.

[12] The deceased was the last grandson of the testators in whose estate a fiduciary asset in terms of the will fell to be dealt with. The substitution following his death will therefore be the last substitution as required by the terms of the will and thus the heirs in terms of this substitution inherit the property free of the *fideicommissary* burden. For ease of reference I shall henceforth refer to the deceased's half share in each of these

properties as 'the *fideicommissary* property'. After advertisement of the estate, 13 persons making up the three groups of claimants described below laid claim to the *fideicommissary* property.

THE VARIOUS CLAIMANTS AND THE BASIS OF THEIR CLAIMS

[13] The first applicant deposed to the founding affidavit and expressed the view that the terms of the *fideicommissum* which discriminate against the female descendants of the testators are against public policy and cannot stand.

[14] He explains that there are three groups of claimants to the *fideicommissary* property. The first group comprises the deceased's daughters (second to sixth applicants) who contend that those provisions of clause 7 of the will which refer to *'sons'* and *'male descendants'* discriminate against them unfairly as members of the female gender. They seek the deletion and amendment of these provisions in clause 7 of the will thereby making them the heiresses to the *fideicommissary* property.

[15] The second group of claimants (the first to third respondents) comprises the three sons of the deceased's late brother, John de Jager (the testators' great grandsons). They base their claim to the *fideicommissary* property on the fact that the deceased left no sons and they contend that according to the *fideicommissum's* terms they are the lawful heirs to it.

[16] The third group of claimants (the fourth to eighth respondents) comprises the grandsons of the deceased (i.e. the great great-grandsons of the testators) namely, the five sons of the first group of claimants. Their claim is based on the assumption that the claim of their mothers based on unfair discrimination against female descendants does not succeed. They contended that in such event clause 7 of the will must be interpreted in

such a way that the *fideicommissary* property devolves on them as the deceased's male descendants (*'manlike nakomelinge'* to use the phrase which appears in the Afrikaans translation of clause 7) rather than upon the second group of claimants.

THE CASES MADE OUT IN THE PAPERS

[17] The first applicant stated that he is not certain to whom he and his fellow executors must transfer the *fideicommissary* property pursuant to his duty as a co-executor. For this reason he was advised to approach the Court for a declaratory order. He expressed the view that the will clearly provided for an indefinite *fideicommissum* restricted to male descendants but explained that in terms of sec 7(1)(b) of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, since there had been one substitution prior to 1 October 1965 in terms of the existing *fideicommissum,* it was restricted to only one further substitution. In the present instance this first substitution had occurred when the *fideicommissary* property devolved upon the deceased in 1957 following the death of his father, Cornelius de Jager.

[18] On my reading of the will, however, the *fideicommissa* were not indefinite but were intended to terminate after the second substitution i.e. when the property devolved upon the third line of heirs. It is common cause that the next substitution of fiduciaries will be the last.

[19] The will was executed in Dutch but the parties accept as correct an English translation of the key provision, clause 7, reading as follows:

> *'With respect to the bequest of grounds/land to their sons and daughters, as referred to under Clauses 1, 2, 3, and 4 of this, their Testament, it is the will and desire of the appearers that such grounds/land will devolve, following the death of their children, to said children's sons and following the death of the said grandsons again and in turn to*

their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other Fidei Commissaire heirs from the lineage of the sons of the appearers by representation, in continuity, and in the case of the death of a daughter or a daughter's son without leaving a male descendant, her or his share will fall away in the same way and on the same conditions, and go to the other daughters or their sons, by representation, or[1] *the deceased's son's brothers or their sons "per stirpes", respectively. And they stipulate furthermore that none of their heirs down to the third generation will renounce, by leasing, donating, selling, or in any other way whatsoever, his (or in the first generation, her) life right or any interest therein/on and should any heir who is subject to the Fidei Commissum, attempt such renunciation, or should such life right or any interest therein be arrested or be seized under the order/sentence of a court or as a result of insolvency of the person to whom the above belongs, then his right will, with immediate effect take an end and will be accepted by the hereinafter appointed administrators, who will, as they deem fit and at their discretion, from time to time, pay out the fruits thereof to such person, or invest said capital until his death when the said amount will devolve, together with the grounds/land, to the nearest and next heir in line.'* [my underlining]

[20] The case of the second to sixth applicants, supported by the first applicant, is based on the contention that clause 7 of the will discriminates unfairly against women by limiting the *fideicommissary* beneficiaries to sons and male descendants. This is reflected in the dominant provision of clause 7 and in particular in the words *'to said children's sons and following the death of said grandsons again and in turn to their sons'*. They ask that the terms of the will be amended so that the words *'seuns'* in the fifth line and the phrase *'manlike nakomeling'* in the seventh line of the agreed (modern) Afrikaans version of clause 7 be amended to read as follows:

> *'[7] Met betrekking tot die vermaking van die gronde aan hul seuns en dogters in klousule 1,2, 3 en 4 van hierdie testament is dit die wil en begeerte van die*

[1] The actual translated English version states "of" but subsequent to the hearing the parties agreed that it should be "or".

> *komparante dat sodanige gronde sal oorgaan na die dood van hul kinders op die se seuns en na die dood van die kleinseuns weer op hulle [seuns] <u>kinders</u> op sodanige wyse dat in geval van die oorlyde van enige seun of seuns sonder [manlike] nakomelinge na te laat, sy aandeel sal verval op dieselfde voorwaardes aan sy broers of hulle seuns by plaasvervulling …'* (deleted words in brackets and substituted words underlined).

[21] The effect of these amendments would be that the *fideicommissary* property will devolve upon the second to sixth applicants, the deceased's daughters. The applicants seek a declaration as invalid of what they regard as the offending portions of the will and the amendment thereof, both in terms of the common law and by a direct application of the Constitution, in particular, sec 9 thereof. They contend that even before the new constitutional dispensation, testators' freedom of testation was limited where provisions in a will were found to be contrary to public policy. The common law, they argue further, has developed extensively since 1902, particularly as a result of the values which have been adopted in the Constitution, with the result that a testator's freedom of testation is limited to the extent that provisions in a will amount to unfair discrimination.

[22] The case for the second group of claimants to the property, namely, the three sons of the late John de Jager, is that the testators' intention as expressed in the will was that the *fideicommissary* property would remain in the De Jager family up to and including the third generation and more specifically, after the testators' children, devolving upon their grandsons and thereafter upon their great grandsons. Where the condition relating to *fideicommissary* property could not be met because the fiduciary or substituted fiduciary left no son, then the property would devolve upon any brother/s or his/their son/s.

[23] These respondents contend furthermore that the will draws a line under the third generation with the result that searches for male descendants in the fourth (or a later)

generation (the case made on behalf of the fourth to the eighth respondents) is misconceived.

[24] The first to third respondents contend therefore that, the deceased having left no sons, the *fideicommissary* property devolves upon them. They point out also that it was based on this interpretation of the will, long held by all, that in 2007 they and the deceased entered into an agreement in terms whereof the deceased became the owner of a half share in three properties, his share still being subject to the *fideicommissum*. They assert that the first applicant's duty is to transfer the deceased's half share in the *fideicommissary* property to them and they dispute both the claim of the deceased's daughters as well as the alternative interpretation of clause 7 contended for by the applicants in terms whereof the *fideicommissary* property would devolve upon the deceased's grandsons as the final substitutes to the *fideicommissary* property.

[25] In his replying affidavit the first applicant conceded that the deceased had initially interpreted the will as excluding his daughters as heiresses to the *fideicommissary* property. The first applicant stated that it was in 2014, upon receiving legal advice from him that either his daughters or his grandsons qualified as *fideicommissary* heirs, that the deceased thereupon instructed him to draw up a new will disposing of the property in question. Even after it was explained to the deceased that he could not legally dispose of these fiduciary assets in a will, he had insisted on drawing up a new will, *'bequeathing'* the property to his five daughters, his thinking being that his grandsons should be aware of his wishes in this regard.

[26] The Master filed a report advising that the deceased died testate and that in terms of his will his five daughters inherited equally. She confirmed the appointment of the

applicants as executors in the estate and advised furthermore that she did not wish to oppose the present application and abided the Court's decision.

THE RELIEF SOUGHT

[27] The applicants seek in the first place a declaratory order that those provisions of the will that exclude the deceased's daughters as fiduciary heiresses to the *fideicommissary* property are *contra bonos mores*, unconstitutional and therefore subject to amendment. They further seek orders in terms whereof, as described above, certain wording in clause 7 is amended so as to remove the discriminatory provision of the *fideicommissum* and cause the deceased's daughters to be declared the fiduciary heiresses to the *fideicommissary* property. In the alternative an order is sought declaring the deceased's grandsons the fiduciary heirs to the *fideicommissary* property, *per stirpes*.

THE LAW

[28] Freedom of testation, according to which testators are free to dispose of their assets in a will in any manner they see fit, is a basic principle of our law of succession. More than a century ago in *Robertson v Robertson's Executors*[2] Innes ACJ noted:

> *'Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.'*

This dictum was quoted with approval by Watermeyer JA in *Jewish Colonial Trust Ltd v Estate Nathan*[3] also a matter concerning a *fideicommissum* and remains good law to this day. The principle of freedom of testation is, however, not completely unrestricted since our law allows for limitations on this freedom based on what Professor De Waal

[2] 1914 AD 503 at 507.
[3] 1940 AD 163 at 183.

describes as relevant social and economic considerations, some statutory, others founded in common law principles.[4] One such restriction is that the courts will not give effect to testamentary provisions if they offend against public policy. The introduction of the new constitutional dispensation and the importance which it gives to the concept of equality has, potentially at least, set the scene for a re-evaluation of the primacy hitherto given to the principle of freedom of testation.

[29] This is illustrated by four cases dealing with testamentary trusts which have come before the Courts under the new constitutional dispensation. In *Minister of Education and Another v Syfrets Trust Ltd NO and Another*[5] (*'Syfrets'*) the Court was faced with a challenge to a charitable testamentary trust established by a will executed in 1920. It provided for bursaries for study abroad but restricted them to persons of *'European descent'* and specifically excluded persons of *'Jewish descent'* and *'females of all nationalities'*. The Minister of Education and the University of Cape Town, which administered the trust, sought an order deleting the discriminatory provisions from the trust deed.

[30] In upholding the challenge Griesel J dealt with it on the basis of existing principles of the common law rather than directly applying the provisions of the equality clause in the Constitution. The question which the Court asked was whether the contested provisions were contrary to public policy and thus unenforceable. It found that since the advent of the constitutional era, public policy was rooted in the Constitution and the fundamental values it enshrined, thus establishing an objective normative value system. It

[4] MJ de Waal 'The social and economic foundations of the Law of Succession' (1997) *Stellenbosch LR* 162.
[5] 2006 (4) SA 205 (C).

held that present day public policy, as opposed to that when the will was executed, was decisive to the application.

[31] Ultimately the Court found that the limitation of eligibility for the bursaries on the basis of *'European descent'* constituted indirect discrimination based on race or colour whilst the exclusion of Jews and women constituted direct discrimination on the grounds of gender and religion. The latter grounds of discrimination were presumed to be unfair in terms of sec 9(3) of the Constitution.[6] The Court then applied the limitations test as set out in *Harksen v Lane NO and Others*[7] thereby enquiring into the fairness of the discrimination and it had regard to international conventions ratified by Parliament dealing with discrimination. It concluded that in the final analysis the Court was required to weigh up competing constitutional values and principles of public policy: on the one hand the right to equality and freedom from unfair discrimination, and on the other the principle of private ownership together with its corollaries of private succession and freedom of testation.[8] The Court's conclusion was that the challenged testamentary provisions constituted unfair discrimination and as such were contrary to public policy with the result that the Court was empowered, in terms of the existing principles of the common law, to order a variation of the trust deed by the deletion of the offending provisions from the will.[9]

[32] In *Ex Parte: BOE Trust Ltd*[10] the trustees of a charitable testamentary trust which provided for bursaries for *'White South African students'* who met certain qualifications to study overseas, were unsuccessful in persuading the Court to delete the word *'White'*

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[6] *Syfrets* n 5 para 33.
[7] 1998 (1) SA 300 (CC) para 53.
[8] *Syfrets* n 5 para 39.
[9] *Syfrets* n 5 para 47.
[10] 2009 (6) SA 470 (WCC).

on the basis that it directly or indirectly discriminated against potential beneficiaries of the bursaries on the basis of race or colour. The trustees contended that the offending provision was contrary to public policy and/or the public interest and that it infringed the right to equality embodied in sec 9(1) of the Constitution (and in other legislation) or the principle set out in the *Syfrets* case.

[33] The Court, per Mitchell AJ, held that although the right to property included the right to give enforceable directions as to its disposal on the death of the owner, freedom of testation could be restricted by laws of general application and considerations of public policy. It held nevertheless that the provisions in question were not contrary to public policy since although sec 9(3) of the Constitution proscribed unfair discrimination, discrimination designed to achieve a legitimate objective was not unfair. One of the conditions for the awarding of a bursary was that the candidate had to return to South Africa for a period stipulated by the selectors. In interpreting the challenged provisions the Court held that it was at least possible that the testatrix was seeking to ameliorate the trend whereby university graduates emigrated upon completion of their education, thereby depriving the country of the benefit of their skills. Mitchell AJ held further that freedom of testation had to include the right to benefit a particular class of persons and not others and that only where that conduct could be categorised as unfair discrimination would it be held contrary to public policy.[11]

[34] In *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others*[12], a decision of the Supreme Court of Appeal, the Court dealt with an offending provision in a testamentary charitable trust which was created in 1938. It was intended to

[11] *BOE Trust* n 10 paras 14-16.
[12] 2010 (6) SA 518 (SCA).

provide funding for the higher education of poor *'European girls born of British South African or Dutch South African parents, who have been resident in Durban for a period of at least three years immediately preceding the grant'*. As trustee of the Fund, the University argued that the racially discriminatory provisions in the trust were contrary to public policy and had to be deleted. In doing so it relied on sec 13 of the Trust Property Control Act, 57 of 1988. The Court found that the racially restrictive nature of the trust was not only at odds with public policy but prevented the testator's objectives being achieved. In concluding that the offending provisions were against the public interest the Court had regard to existing case law, notably the *Syfrets* case, the right to equality, public policy and the fact that the trust was a public charitable fund administered by a public institution.[13]

[35] The Court held ultimately that the constitutional imperative of removing racially restrictive provisions takes precedence over freedom of testation and, for that reason, does not amount to unlawful deprivation of property as constitutionally defined. The Court stated in this regard that:

> *'The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past. Given the rationale set out above, it does not amount to unlawful deprivation of property'*.[14]

The question of whether or not the Constitution applied directly to the law of succession was, however, left unanswered.

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[13] *Emma Smith Educational Fund* n 12 paras 34-42.
[14] *Emma Smith Educational Fund* n 12 para 42.

[36] Similar questions were addressed in *In re: Heydenrych Testamentary Trust and Others*[15] where the Court was again required to deal with certain charitable testamentary trusts which made provision for the allocation of scholarships on the discriminatory grounds of race, descent and gender. The applicants, the administrators of the trust, sought an order deleting those provisions of the trusts which discriminated directly on the grounds of race and colour but not those provisions which discriminated directly on the grounds of sex and/or gender and indirectly on racial grounds on the basis that such discrimination should be treated *'more circumspectly'* by the Court than direct discrimination on the grounds of race.[16] All of the testamentary trusts were executed in terms of wills executed prior to the new constitutional dispensation, one in 1943 and the other two during the 1980's. However, the Women's Legal Centre intervened as amicus curiae and took issue with those discriminatory provisions not challenged by the applicant, including those based on the ground of gender in respect of two of the trusts.

[37] The Court found that the impugned provisions in two of the trusts constituted unfair discrimination on the grounds of gender and race and were in conflict with sec 9(4) of the Constitution and the public interest.[17] It held further that the unfairly discriminatory provisions of the trusts had brought about consequences which the founders had not contemplated or foreseen. Goliath J stated as follows in this regard:

> *'All the wills in question were executed before the advent of our democracy and the introduction of the Constitution. The testators would not have foreseen that the allocation of scholarships by the trusts on a discriminatory basis would be rendered unconstitutional and unlawful.'*[18]

[15] 2012 (4) SA 103 (WCC).
[16] *Heydenrych* n 15 para 2.
[17] *Heydenrych* n 15 para 20.
[18] *Heydenrych* n 15 para 21.

In the result the Court varied the terms of the trusts inter alia so as to delete those provisions which discriminated against persons on the grounds of gender or sex.

[38] These developments in our law of succession based on our new constitutional values have been welcomed by academic commentators although some concerns have been expressed that the principle of freedom of testation should not be adulterated. The question which arises is to what extent challenges to testamentary dispositions based on the right to equality (and in particular, not to be unfairly discriminated against) will be recognised outside the area of charitable testamentary trust having a public nature.

[39] I am aware of only one recent case dealing with a testamentary disposition having no public character, namely, the recent decision of my brother Dlodlo in *Harper and Others v Crawford NO and Others*[19] which is instructive. In *Harper's* case Dlodlo J had to consider, amongst other issues, whether the Court could amend the wording of a testamentary trust so as to make certain adopted children beneficiaries of the trust in circumstances where it appeared that the donor had not intended this result. The applicants also relied on sec 9 of the Constitution and on post-constitutional changing public policy. Dlodlo J noted that the relief sought was far-reaching inasmuch as it would require the Court to intervene in the right of an owner to dispose of his property as he saw fit.[20] He regarded it as an important factor that the line of cases commencing with *Syfrets* dealt with trusts having a public character as opposed to the instrument in question which was a private trust deed.[21]

[19] Unreported decision (Case No: 9581/2015), handed down on 30 June 2017.
[20] *Harper* n 19 para 22.
[21] *Harper* n 19 para 30.

[40] The learned judge also noted the significant parallels between testamentary freedom and contractual freedom and that whilst a contract may be declared invalid for being contrary to public policy, this occurs in only the rarest of cases.[22] He found support for the Court's reluctance to interfere with choices made by individuals in the private law areas of their lives in the following passage from the writings of HLA Hart, The Concept of Law (1961) at pp 40 – 41, quoted with approval by Cameron JA in *Brisley v Drotsky*:[23]

> *'Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build.'*

[41] Dlodlo J found that it would be anomalous were the Constitution, whose primary purpose is to secure the freedom of individuals from undue State interference, to be used to curtail an individual's freedom, in this case the freedom to dispose of one's property as one chose. He added that any attack on a will or trust instrument based on allegedly discriminatory provisions should provide a cogent answer to the question of why different consequences should apply to the distribution of property of a deceased person than applies to that of a living person.[24]

[42] The learned judge then conducted the limitation test envisaged in sec 36 of the Constitution[25] on the assumption that the provisions of the trust deed did unfairly discriminate, observing that such an enquiry must be concluded before there can be a finding that a particular testamentary provision is contrary to public policy. Dlodlo J

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[22] *Harper* n 19 para 32.
[23] 2002 (4) SA 1 (SCA) para 94.
[24] *Harper* n 19 para 32.
[25] *Harper* n 19 para 33. See also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607D-E.

concluded that the Court had no competency to vary the relevant provisions of the trust deed just as it would have no power or authority to change any testator's will.[26]

[43] The general principle is that courts will not authorise the variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy, save in exceptional circumstances or under statutory authority. This applies, as the authors of the leading textbook on the law of succession[27], puts it, *'(n)o matter how capricious, unreasonable, unfair, inconvenient or even absurd they may be'*.[28]

> *'Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.'*

[44] In his chapter on the Law of Succession and the Bill of Rights in the Bill of Rights Compendium[29] and in the section dealing with freedom of testation and the equality clause, Professor De Waal concludes that the equality clause in the Constitution does not provide a basis for an attack on the validity of a will on grounds such as the fact that only female descendants have been instituted as heirs.[30]

[45] Corbett and his fellow authors align themselves with Professor De Waal's views, inter alia for the reasons that no beneficiary has a fundamental right to inherit, that disherison does not detract from the beneficiary's rights, and noting that two constitutional rights, namely, freedom of testation and the right to equality are involved. They point, as does Professor De Waal, to the practical difficulties which would be involved in such a challenge not least relating to the remedy, such as whether the Court

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[26] *Harper* n 19 para 34.
[27] MM Corbett, G Hofmeyr and E Khan *The Law of Succession in South Africa* 2ed (2001) at 485.
[28] *Citing Halsbury 4 ed Reissue vol 50 (1998) sv 'Wills' para 482*.
[29] MJ de Waal 'The Law of Succession and the Bill of Rights' in *Bill of Rights Compendium* (June 2012) 3G1-G15.
[30] De Waal 'Law of Succession' n 29 3G8-3G12.

could *'rewrite'* the will and where the line would be drawn between deserving and undeserving would-be beneficiaries.[31]

DISCUSSION

[46] Against this background I turn to consider the challenge to the provisions of the will in the present matter. One notes firstly that the bequests made by the testators more than 100 years ago have not yet been completed in the sense that the *fideicommissary* property is yet to devolve upon the final heirs. It is apparent moreover that the *fideicommissa* established by the testators discriminate against certain of their female descendants i.e. all but their own daughters, solely on the grounds of their gender. There was no real disagreement between the parties that clause 7 of the will broadly discriminates against the testators' female descendants beyond the first generation inasmuch as they are precluded from being substituted as the fiduciaries to the *fideicommissary* property by reason of their gender alone. Nor did the first to third respondents attempt to make out a case, either on the papers or in argument, that such discrimination against the applicants was fair. Their case is rather that the common law should not be developed, either by way of a direct constitutional challenge or through the doctrine of public policy, to limit the testators' freedom of testation in the present circumstances.

[47] It is important to note that this is not a case of a testamentary trust, let alone one with a public character and an indefinite life, containing provisions which discriminate against one or more sectors of society as was the case in at least three of the four cases beginning with *Syfrets*. It is rather a case of disherison of certain descendants.

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[31] Corbett *et al Law of Succession in South Africa* n 27 at 134.

[48] The Constitution and legislation flowing therefrom turns its face against discrimination on the grounds of sex or gender. Section 1 of our Constitution establishes as founding values of our new democratic state *'(h)uman dignity, the achievement of equality and the advancement of human rights and freedoms'* as well as *'non-racialism and non-sexism'*. The democratic values of human dignity and equality are restated in sec 7 which introduce the Bill of Rights, whilst sec 8 provides that the Bill of Rights applies to all law and also binds the judiciary. Section 8(2) proclaims that a provision of the Bill of Rights binds a natural person *'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'*. Subsection 8(3) enjoins a court, when applying a provision of the Bill of Rights to a natural or juristic person:

> *'(a) in order to give effect to a right in the Bill,* [to] *apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;'*

and provides that such court

> *'(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)'.*

[49] The right to equality is guaranteed by sec 9 of the Constitution which provides inter alia as follows:

> *'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
>
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status,*

ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[50] National legislation was duly enacted pursuant to sec 9 (4) of the Constitution in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ('the Equality Act').

[51] Section 4(2) prescribes that, in applying the Act *'(t)he existence of systematic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by'* amongst others factors, colonialism and patriarchy, must be taken into account. It also refers to '*the need to take measures at all levels to eliminate such discrimination and inequalities'.*

[52] Listed amongst the prohibited grounds of discrimination are gender and sex, or any other ground where discrimination based on such ground *'undermines human dignity'*. Section 8 deals with the prohibition of unfair discrimination on the ground of gender and provides, insofar as it is material, that:

'... no person may unfairly discriminate against any person on the ground of gender, including –

...

(c) the system of preventing women from inheriting family property;

> *(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'.*

[53] It is not without significance that sec 8(c) of the Equality Act expressly addresses gender discrimination in the context of succession, but only in respect of discrimination by means of a system and not private wills. An example of such a discriminatory system is that of primogeniture which has since been tempered by the Constitutional Court in *Bhe v Magistrate, Khayelitsha*.[32] In that matter the Constitutional Court declared that the customary law rule of male primogeniture and the legislative provisions relating thereto were unconstitutional and invalid inasmuch as they amounted to violations of women's right not to be unfairly discriminated against on the ground of gender as well as their right to dignity. It ordered that the Intestate Succession Act, 81 of 1987 be applied to all customary law estates. The discrimination in that case, however, was an incident of the operation of law. The case did not engage the issue of freedom of testation. The present matter, however, does not involve any testamentary *'system'* or *'practice'* which prevents women from inheriting family property or impairs their dignity. Notwithstanding the fact that the *fideicommissary* structure in the pending matter has endured for more than a 100 years it would be a strained interpretation thereof to describe it as *'system'* or *'practice'* as is contemplated by sec 8(c) of the Equality Act as opposed to a one-off, private testamentary disposition by the testators.

[54] Freedom of testation is not directly referred to in the Constitution and must be seen primarily as a corollary of the right to property. That right is embodied in sec 25 of the Bill of Rights in the following general terms:

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[32] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) paras 75 - 78.

> *'(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*.'

[55] In *Syfrets* Griesel J raised, but did not decide, the question of whether, despite neither sec 25 nor any other provision in the Constitution specifically referring to freedom of testation or the right of persons to dispose of their assets upon death, freedom of testation forms an integral part of a person's right to property and must therefore be taken to be protected in terms of sec 25. However, in dismissing the appeal in *In re: BOE Trust Ltd and Others NNO*[33] the Supreme Court of Appeal affirmed the view that sec 25 of the Constitution protects a person's right to dispose of their assets as they wish upon their death. It held that if the contrary were to obtain, a person's death would mean that the courts and the state would be able to infringe a person's property rights after he/she has passed away, unbounded by the strictures which obtained while that person is still alive.[34] The Court also found that freedom of testation was underpinned by the founding constitutional principle of human dignity. Although not relied upon by the Court, freedom of testation arguably also bears upon aspects of the right to privacy, freedom of expression and freedom of association. The Court held further that freedom of testation is a founding principle of the law of testate succession in that a testator enjoys the freedom to dispose of the assets which form part of his/her estate upon death in any manner he/she deems fit. The Court qualified this endorsement, however, in stating that freedom of testation is not absolute and that a court is not obliged to give effect to the wishes of the testator if there is some rule of law preventing it from doing so.[35] In doing so it was in effect reaffirming the principle stated by Innes ACJ in *Robertson v*

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[33] 2013 (3) SA 236 (SCA).
[34] *BOE Trust (SCA)* n 33 para 26.
[35] *BOE Trust (SCA)* n 33 para 28.

Robertson's Executors[36] that once the testator's intention had been determined in accordance with the language of a will the courts are bound to give effect to it 'unless [they] are prevented by some rule or law from doing so'. The primary question in the current case is thus whether the Constitution affords such a law to negate the impugned terms of the *fideicommissum*.

[56] I proceed therefore on an acceptance that the constitutionally protected right to property includes a right to freedom of testation (with the qualification that this is not absolute), and further accepting that the wishes of the testators in this matter were that, beyond the first generation, the *fideicommissary* property would, as far as the second and the third generations were concerned, not devolve upon their female descendants.

[57] The enquiry remains whether the challenged provisions of the will are contrary to public policy or susceptible to a direct challenge in terms of the equality provisions of the Constitution.

[58] Perhaps the first question is whether the impugned provisions are discriminatory. Having regard to the terms of sec 9(4) of the Constitution read with 9(5) and its presumption of unfairness where a listed ground is involved, the conclusion must be drawn that clause 7 of the will effects unfair discrimination against the testators' female descendants, at least in the second and third generations. Certainly the first to third respondents did not seek to advance any facts or arguments suggesting that such discrimination was fair. The question remains, however, whether in the absence of any legal right by any of the testators' descendants to testamentary inheritance, the discriminatory effect can be said to be legally relevant. Professor de Waal has argued in

[36] *Robertson* n 2 at 507.

favour of the constitutional justifiability of freedom of testation apparently assuming that it is.

[59] In defending the testators' right to freedom of testation the first to third respondents relied on the arguments advanced by Professor De Waal who concludes that a limitation of the right to equality by the testators' right to freedom of testation can be justified in terms of sec 36(1) of the Constitution. He cites the following reasons:

> *'(a) An opposite conclusion would not only reduce the concept of freedom of testation to a fiction, but would also render the guarantee of freedom of testation in the Bill of Rights meaningless.*
>
> *(b) Nobody has a fundamental "right to inherit". The exclusion of a person as beneficiary does not, therefore, result in an encroachment upon or taking away of existing rights. A potential beneficiary at most possesses a spes or hope which, by its nature, can easily be frustrated.*
>
> *(c) It seems to be a sound proposition, both as a matter of principle and common sense, that a testator or testatrix should, within the limits set by social and economic considerations, be free to institute beneficiaries of his or her own choice.*
>
> *(d) An opposite conclusion would lead to nearly insurmountable practical difficulties, some of which may be mentioned…'*[37]

In this latter regard Professor De Waal refers to difficulties in fashioning an appropriate remedy e.g. whether the Court should *'rewrite'* the will and whether to institute the aggrieved person as heir or rather declare the will invalid.

[60] Professor De Waal's first reason, although possibly somewhat overstated, undoubtedly has force. Granting the primary relief sought will herein require a rewriting of the testators' will. The testators' freedom of testation, although nominally recognised,

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[37] De Waal 'Law of Succession' n 29 3G19-3G20.

will be subjected to an overriding right on the part of the court to amend their will. By any measure this will amount to a far-reaching inroad upon the right to freedom of testation and set a weighty precedent.

[61] On behalf of the applicants it was sought to ameliorate the problematic implications of the courts having the power to rewrite discriminatory provisions of a will with the argument that each case must be dealt with on its own facts and that there might well be cases where discrimination against the female gender would be fair. One of the many difficulties with this approach, however, is that it would make a court the final arbiter in the choice of beneficiaries in testamentary dispositions of a non-public nature in a particularly private and personal area, namely, one's last wishes as to how and to whom to dispose of one's property. It would give rise to situations where a testator's last wishes are second-guessed by a court which might have little inkling as to why the testator or testatrix provided as he or she did. Another possible consequence of the courts assuming a power to intervene in situations such as the present would be that testators/testatrices might then seek to justify, in their wills, certain dispositions with the courts then being asked to analyse or go behind these explanations. The spectre of a Pandora's box of litigation regarding private testamentary dispositions thereby being opened is by no means far-fetched. I can see no basis in legal principle for a court to purport to exercise on a surrogate basis any person's *ius disponendi*. In the context of testation to do so would be to impute obligations to the testator that had not subsisted when he was alive, again a far-reaching proposition. Such a notion contemplates the exercise of a power that is wholly distinguishable from that of amending the terms of a charitable or educational trust even if such trust were established in terms of a will. The latter case involves determining altered terms for how property that has been bequeathed should be

administered, something quite different from determining whether the property should have been bequeathed to a particular person.

[62] Testation is a field where the courts will proceed, I would respectfully suggest, from the starting point that a testator has maximum freedom to dispose of his or her property upon their death as he or she sees fit subject to existing rules of law as set out in case law and any statutory constraints which exist.

[63] Professor De Waal's second reason, namely, that nobody has a fundamental *'right to inherit'* also carries considerable weight inasmuch as the right to equality and the hope or expectation of inheriting should not be conflated. The applicants argue, in response, that this argument cuts both ways since, on the facts of the present matter the favoured male descendants also had no inherent *'right to inherit'*. This, however, misses the point since, on the assumption that the interpretation of clause 7 of the will adopted up until present is correct, the first to third respondents enjoyed at least contingent rights to the *fideicommissary* property until, on the deceased's death, the right to claim such property vested in them.

[64] The applicants also point to the fact that persons who, but for discriminatory provisions would qualify as potential beneficiaries of a testamentary charitable trust (such as dealt with in the line of cases beginning with *Syfrets)* also have no inherent right to inherit either. This is not a true equivalence however. The beneficiaries of such a trust do not stand on the same footing as an heir or heiress. They must first apply to benefit from the provisions of a trust of a public character established by the testators' will, to my mind a quite different situation.

[65] Thirdly, Professor De Waal argues that within the limits set by social and economic considerations a testator/testatrix is free to institute beneficiaries of his or her own choice. The limits which exist are those set by statute, relating to the duty of support in the main, and curtailed by the doctrine of public policy. The scope for this doctrine to operate in the area of private testation will be more limited however since the Constitution affords a great deal of autonomy to citizens in respect of their own right to dignity and self-determination. Autonomy in this respect is an important part of what gives substance to the right to human dignity.

[66] Finally, Professor De Waal argues that any incursion into the principle of freedom of testation such as is sought in the present matter would lead to nearly insurmountable practical difficulties. Whilst this might not always be the case there can be no doubt that such cases will present themselves.

[67] Any incursion will also inevitably create uncertainty in the minds of some testators as to whether their testamentary dispositions will be fully executed or not, in itself an inherently unsatisfactory situation. In this regard the first to third respondents also place emphasis on the right to dignity, an incident of which would be to allow the living, and the dying, the peace of mind of knowing that one's last wishes will be respected upon one's death. It was argued that the right to dignity, similar to the right to equality, is one of the core values on which the Constitution rests. In terms of sec 1(a) of the Constitution such values include human dignity. Dignity is also enshrined in the Bill of Rights, sec 10 of the Constitution providing *'(e)veryone has the inherent dignity and the right to have their dignity respected and protected'*.

[68] In other instances the result of a court intervening could be a somewhat arbitrary outcome. For example, in the present matter if the relief sought is granted it will have the effect of making the second to sixth applicants the heiresses to the *fideicommissary* property. However, this would at the same time favour them over many other female (and male) descendants of the testators. According to the abridged family tree provided in the papers, the testators' three grandsons inherited the property at the expense of their six sisters and, assuming some of those sisters had children, in all probability at the expense of their sons and daughters as well. Thus granting the relief sought in an effort to give effect to the right to equality and not to be unfairly discriminated against would, notionally at least, arbitrarily favour a small group of female descendants at the expense of many other prior descendants, both female and male.

[69] This matter could be seen as involving a choice between the lesser of two evils: perpetuating gender discrimination or undue interference with the right to freedom of testation. However, whilst the terms of the *fideicommissum* discriminate against the testators' female descendants simply on the grounds of their gender, allowing the right to equality to trump the right to freedom of testation in the present circumstances, although superficially equitable, would produce an arbitrary result. At the same time it would represent a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.

[70] A further argument made on behalf of the applicants was that the constitutionally protected status of the right to equality as well as the fact that it does not, in principle, rank lower than the right to freedom of testation, should be taken into account when the

two rights are weighed against each other in an instance such as the present. The situation of competing rights elicited the following dictum from the Constitutional Court:[38]

> *'Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association. Even values like freedom and equality may compete. Therefore they often have to be weighed, balanced and limited. The limitation clause provides for this.'*

[71] Applying and adapting the approach set out by the Constitutional Court in *Harksen v Lane*,[39] the next stage of the enquiry is a determination whether the provision, in this case the impugned provision of clause 7 of the will, can be justified under the limitation clause in sec 36 of the Constitution.

[72] Section 36(1) of the Constitution, in the present case read with sec 8(2) and 8(3)(b), provides as follows:

> *'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.'*

[73] In applying the limitation test it is significant that two of the three values mentioned in sec 36, human dignity and freedom, are engaged when exercising one's right to freedom of testation. The right to equality or to equal treatment, although fundamental, is a broadly stated right and must, in appropriate instances, give way to competing rights.

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[38] *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) para 77.
[39] *Harksen* n 7.

[74] As far as the importance of the limitation is concerned, no material has been placed before the Court to indicate whether similar discriminatory provisions in private wills are a common-place problem which justifies such a potentially far-reaching limitation. The envisaged limitation, namely, that one cannot dispose of one's property without first complying with an equality equation, would make a significant inroad upon the right to freedom of testation and may well produce unintended consequences including those referred to above.

[75] As regards the nature and extent of the limitation, weight must be given to the fact that the discriminatory provisions of the will occur in the private and limited sphere of the testators and their direct descendants. It thus affects only a limited number of persons, is of limited duration and is not manifestly directed at infringing the complainants' dignity. In *De Lange*[40] the Court highlighted the need for a sensitive approach where concerned with an individual's private sphere and autonomy, stating as follows:

> *'[79] It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preferences. …*
>
> *[80] The closer courts get to personal and intimate spheres, the more they enter into the inner sanctum and thus interfere with our privacy and autonomy.'*

[76] Whilst the relationship between the limitation of the right to freedom of testation in the present matter and its purpose is clear, it is difficult to conceive of a less restrictive means to achieve the purpose.

[77] The applicants' advanced two reasons why the right to equality should prevail over the right to freedom of testation. The first was that sec 9 of the Constitution does not

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[40] *De Lange* n 38.

refer directly to freedom of testation as a guaranteed right. In my view this takes too narrow a view of the property clause in the Bill of Rights, particularly in light of the Supreme Court of Appeal's endorsement of the right to freedom of testation in *BOE Trust Limited*.[41]

[78] The second reason advanced was that public policy had transformed dramatically since 1902 when the testators executed their will. This is of course so, not least in the area of gender discrimination. It is also trite that public policy must be determined in relation to present day mores. Notwithstanding these factors the question must be whether public policy has advanced to the extent that courts should be empowered to act as the final arbiter of whether a testator may discriminate, even unfairly so, in his or her private will.

[79] The circumstances of the present matter constitute a quite different situation to that where prescriptive conditions are attached to testamentary provisions which may have the effect of influencing the conduct of a beneficiary, for example, conditions that are calculated to cause the breakup of a marriage. In such instances, as our courts have prescribed in the past, the courts will intervene and treat the condition as pro non scripto.[42]

[80] For all these reasons I consider that, even if it assumed in favour of the female descendants of the testators that they notionally have a right to be treated equally with the male descendants in the exercise by the testators of their freedom of testation, the limitation on the second to sixth applicants' rights to equality in the form of the discrimination against them effected by clause 7 of the will is reasonable and justifiable,

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[41] *BOE Trust (SCA)* n 33 para 28.
[42] *Levy, NO and Another v Schwartz, NO and Others* 1948 (4) SA 930 (W) at 938.

particularly given the importance accorded to the right to freedom of testation. The direct constitutional challenge to the disputed provisions of the will must therefore fail.

[81] Nor am I persuaded, for similar reasons, that the disputed provisions of clause 7 are against public policy. In the particular circumstances of this matter, I do not consider that the general public would regard that the testators' decision to impose the *fideicommissary* condition discriminating against female descendants as so unreasonable and offensive that such provisions must be considered as offending against public policy.

[82] In the result I conclude that the applicants have failed to make out their case for the primary relief sought.

THE CLAIM OF THE FOURTH TO EIGHTH RESPONDENTS

[83] This brings me to the alternative argument advanced on behalf of the applicants, one in favour of the fourth to eighth respondents, namely, that on a proper interpretation of clause 7 of the will the deceased's grandsons must be substituted as fiduciary heirs to the property.

[84] The interpretation contended for centres around the words *'a male descendant'* in the first sub provision of clause 7 which reads in full *'... in the case of the death of any son or son's son who does not leave a male descendant ('manlike nakomelinge'), his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place…'*.

[85] In essence the argument is that the use of the words *'manlike nakomelinge'* (in the official translated Afrikaans version) instead of *'seun'* is a clear indication that the testators had a different (and wider) category of persons in mind rather than sons,

namely, any male descendants. The words *'manlike nakomelinge'* must, on this interpretation also include the grandsons of the deceased Kalvyn de Jager i.e. remoter descendants than merely the first generation after the deceased.

[86] The applicants rely in part on the decision in *Du Plessis NO v Strauss*[43] where the Court held that in terms of the law of Holland a *si sine liberis decesserit* clause attached to a conditional *fideicommissum* gives rise to a rebuttable presumption that a testator tacitly appointed the *liberi* (children, descendants or issue) as *fideicommissary* beneficiaries, provided that the *liberi* are descendants of the testator although the presumption gives way where the intention of the testator to a different effect can be determined with reasonable certainty.

[87] The applicants argue by analogy that even though the sub-provision does not expressly state that the *fideicommissary* property is left to the male descendants of the deceased (i.e. including his grandsons), such a term will be implied and in the absence of a son, as in this instance, will be inherited by the deceased's grandsons. The applicants point out that the ordinary meaning of *'descendants'* is not limited to sons alone i.e. the first generation of descendants, but includes remoter beneficiaries.

[88] In arguing against the interpretation contended for by the applicants, the first to third respondents break up clause 7 into its component parts of a dominant provision, three sub-provisions and a prohibition. The dominant provision or grammatical main sentence of the *fideicommissum* ends with the words *'again and in turn to their sons'*. The three sub-provisions are introduced by the phrase, *'in such a way that'* and each provides for a particular contingency, as opposed to an inevitable future occurrence. Then

[43] 1988 (2) SA 105 (A).

follows the prohibition against alienation with which we need not be concerned for present purposes. The first to third respondents contend then that the scheme of the *fideicommissum* appears clearly from the dominant provision, namely, that the properties were bequeathed to the testators' sons and daughters, whereafter it devolves sequentially on the testators' grandsons and great grandsons.

[89] The first sub-provision deals with the eventuality of a son or grandson dying without leaving *'manlike nakomelinge'*, the second with such a grandson dying without leaving brothers and the third with a death of a daughter or a daughter's son without leaving '*manlike nakomelinge'*.

[90] The first sub-proviso is relevant given that the contingency it deals with, the death of a grandson, has come to pass and in that context the meaning of the phrase *'manlike nakomeling'* must be determined. The first to third respondents contend that it must be construed as referring to sons only and not to the deceased's grandsons for a number of reasons; firstly the introductory phrase – *'in such a way'* – emphasises that the sub-provisions are subservient to the dominant provision and do not create an exception, extension or a proviso to the dominant provision which might allow for the wider construction contended for by the applicants.

[91] Secondly, as a matter of grammar and syntax it is contended that the phrase *'in such a way'* provides the method (the way) in the event of any of the three contingencies to still nevertheless achieve the result of the dominant provision. The result, the first to third respondents contend, is to give effect to the overall scheme established by the relevant provisions of the will which is to ensure that the property ends up in the hands of either grandsons or great grandsons. In this regard they argue that the testators intended

to draw a line under the third generation. This would indeed appear to be the case given the concluding prohibition in clause 7 against the alienation of the *fideicommisary* property by any heir up to the third generation.

[92] Should the *fideicommisary* property devolve on the fourth generation i.e. by skipping the third generation, the number of *fideicommissary* beneficiaries will potentially increase at a much greater rate leading to smaller and smaller shares in the property, presumably a result which the testators wished to avoid or ameliorate by terminating the *fideicommissum* at the third generation. It is also argued that since the testators knew none of their grandsons or great grandsons they would have regarded their great grandsons as a single class of beneficiaries and it was therefore unlikely that upon the death of a grandson (such as the deceased) they intended that their great grandsons would be passed over in favour of remoter heirs, namely, great great-grandsons.

DISCUSSION

[93] As a starting point it should be noted that the rebuttable presumption endorsed in *Du Plessis NO v Strauss (supra)* gives way where the will as a whole shows that the testator did not intend to create a tacit *fideicommissum* (in this case extending to the fourth generation i.e. the great great-grandchildren of the testators).

[94] Corbett *et al* point out that the general rule of construction which raises a presumption against the creation of a *fideicommissum* applies also to questions concerning its ambit with the result that a *fideicommissum* is strictly interpreted and a construction favoured which imposes the least possible burden upon the fiduciary. The presumption and approach to a *fideicommissum's* construction applies only where there is a reasonable doubt as to the intention of the testator, having regard to the will's wording.

[95] Regarding problems in identifying the *fideicommisary,* the authors point out that problems of interpretation in regard to the identity of the *fideicommissary* usually arise where a number of *fideicommissaries* have been indicated by the testator, not by name but by some generic description. The main point to be decided is the meaning and ambit of the descriptive words used. This is primarily a question of interpreting the intention of the testator as expressed in the will.

[96] If not for the existence of the three sub-provisions, the terms of the *fideicommissum* would be clearly indicated in what the first to third respondents describe as the dominant clause. The difficulty arises where the sub provisions make use of the phrase *'manlike nakomelinge'* in the first and third sub provisions. That phrase has a wider meaning than that of son and the question is whether the effect must be given to the wider meaning or the narrower meaning.

[97] In this regard it is a principle of testamentary interpretation that a court is entitled to depart from the primary meaning of the word where the context so directs. In addition the Appellate Division has also remarked that it is a common phenomenon that a drafter of a will, may use different words to express the same idea or intention.[44]

[98] *Ex Parte: Estate van der Ven*[45] is a case in point. It involved the provisions of a trust deed in terms of which the founder (appearer) bequeathed a sum of money to his sister in law. It further provided that upon her death the sum would go to his godchild, Henri, and that upon the latter's death the sum *'shall devolve upon his (Henri's) children,*

[44] *Harter v Epstein* 1953 (1) SA 287 (A) at 295G.
[45] 1968 (4) SA 772 (C).

should he, however, depart this life, without leaving issue, in such case, the said sum … shall devolve … upon the said appearer's children…'.[46]

[99] Henri passed away without leaving children but did leave a granddaughter. The issue which the Court had to determine was whether the word *'issue'* had the effect of extending the meaning of the preceding reference to *'children'* or whether the word *'children'* had the effect of narrowing the meaning of the word *'issue'* so as to include children only. The Court referred to the ordinary and primary meanings of *'children'* and *'issue'* respectively and stated: *'In other words, "issue" is a word of wider meaning than "children" in that it includes not only children but also grandchildren and remoter descendants'*.[47] Upon consideration of the context and the clause's provisions as a whole, the Court concluded that the word *'children'* bore its ordinary meaning and that the word *'issue'* should be construed as referring to children only. One of the factors which brought the court to this conclusion was stated as follows:

> *'In the first place, by adopting this construction it is possible to read the will without giving a strained meaning to either word. The word "children" is given its ordinary meaning, and the word "issue" is also given one of its ordinary meanings, for it would be perfectly correct to refer to one's children as one's issue.'*[48]

[100] By analogy in the present matter the words *'manlike nakomeling'* (male descendant) has as an acceptable meaning, a son, and can be read as referring to a son by using different phraseology. It is indeed so that the words *'manlike nakomelinge'* can bear the wider meaning of any male descendant i.e. male descendants beyond the first degree (in relation to the deceased). However to give the phrase *'manlike nakomelinge'* the wider meaning of any male descendant is, in my view, to give it a strained and

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[46] *Estate van der Ven* n 44 at 773D.
[47] *Estate van der Ven* n 44 at 774G-H.
[48] *Estate van der Ven* n 44 at 777A-C.

artificial interpretation and one at odds with the clause's earlier use of the word and its overall structure. It would place it at odds with the use of the word *'seuns'* in the main and dominant provision of clause 7. If the drafter had intended the wider meaning contended for by the applicants then one would have expected the words *'manlike nakomelinge'* to have been introduced into the dominant provision of clause 7 from the outset i.e. by stating *'op hulle manlike nakomelinge'* rather than *'weer op hulle seuns'*.

[101] I find persuasive the syntactic breakdown of clause 7 as advanced on behalf of the first to third respondents which identifies a dominant provision and three sub-provisions. Support for an approach which seeks to identify the dominant clause in order to interpret the intent of a testator as expressed in a will is to be found in *Raubenheimer v Raubenheimer*.[49] There, having performed this exercise, Leach JA stated of other provisions seemingly at odds with the dominant clause that the latter's *'effect should not be modified nor its meaning strained'* unless a contrary intention is clearly indicated by other provisions in the will.[50] Adopting this approach the structure of the *fideicommissum* thereby revealed turns around the phrase *'in such a way'* and indicates that each of the three sub-provisions provides a method, in the event of a particular contingency, to still achieve the purpose of the dominant provision namely, for the *fideicommissary* property to end up in the hands of the testators' grandsons or great grandsons, as the case may be. If the phrase *'manlike nakomelinge'* is given a wide meaning i.e. extending beyond a son/s, then that purpose is defeated.

[102] It is also significant that if the wider meaning is attributed to the words *'manlike nakomelinge'* then the final prohibition in clause 7 *'tot in die derde geslag'* against

[49] 2012 (5) SA 290 (SCA) at para 18.
[50] See also the authorities relied upon by the Court in *Ex parte Melle and Others* 1954 (2) SA 329 (A) at 344 and *Schaumberg v Stark NO* 1956 (4) SA 462 (A) at 468D–G.

alienation of the *fideicommissary* property becomes inaccurate inasmuch as its true reach in the present circumstances would be up to the fourth generation. This required the applicants to contend that *'third generation'* should not bear its primary meaning but rather refer to the third line of successors. No other reason is given for this strained meaning of *'third generation'*.

[103] I am persuaded that the proper interpretation of clause 7 is that the testators intended to limit the *fideicommissum* or the *fideicommissaries* to their grandsons and great grandsons, drawing the line at the third generation. The applicants' interpretation of the words *'manlike nakomelinge'* requires, by contrast, somewhat strained meanings of the phrases, '*in such a way'* and *'third generation'* referred to in clause 7 as well as the reading in of a tacit *fideicommissum* in the first sub-provision in favour of the fourth generation (or even beyond it). By contrast the interpretation contended for by the first to third respondents entails merely that one of the ordinary meanings of *'male descendants'* be applied, namely, a son or sons.

[104] For these reasons I find that the applicants have failed also to make out a case for the relief sought on the alternative basis put forward.

[105] Although the first applicant and his fellow applicants purported to come to court seeking a declaratory order on the meaning of the will insofar as it affected the *fideicommissary* property, no provision is made in the notice of motion for an order which favours the first to third respondents' interpretation of the challenged provisions. Furthermore, the first to third respondents have not brought a counter application seeking a declaratory order in their favour but merely asked that the application be dismissed with costs, which accordingly will be the appropriate order.

COSTS

[106] At various stages the parties sought costs orders in different forms. Ultimately, however, the applicants sought an order that all parties pay their own costs, irrespective of the outcome of the application. By contrast the first to third respondents sought an order that all parties costs be paid out of the estate, again irrespective of the outcome. In the alternative they proposed that the costs of the successful parties be paid out of the estate and that the unsuccessful parties bear their own costs.

[107] Although the first to third respondents have been successful in their opposition, the applicants' case was by no means frivolous or obviously without merit. At its heart, moreover, lay a constitutional challenge in the field of private testamentary dispositions based on the right to equality in which field, since the adoption of the Constitution, there has been little or no litigation directly on point. *Harper'*s case, which as I have found gave relevant guidance, was decided well after the present matter was argued.

[108] In the circumstances to visit the applicants with a costs order does not strike me as appropriate or equitable. Since the second to sixth applicants are the testate heiresses to the deceased's estate, which estate excludes the *fideicommissary* property, the effect of granting either of the costs orders proposed on behalf of the first to third respondents would in effect be to grant an order against the second to sixth applicants personally.

[109] Taking all relevant circumstances into account I consider that the most appropriate result would be that all parties pay their own costs. That would be achieved by directing that there shall be no order as to costs.

ORDER

[110] In the result, the following order is made:

1. *The application is dismissed.*

2. *There shall be no order as to costs.*

BOZALEK J

APPEARANCES

For the Applicants	*:*	*Adv JA van der Merwe (SC)*
As Instructed by	*:*	*Visagie Vos Attorneys* *Ref: PS Basson*
For the 1st – 3rd Respondents	*:*	*Adv H du Toit*
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